

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

CASE NO.: 8:03-CR-77-TLB-TBM

vs.

SAMEEH HAMMOUDEH

AMENDED
DEFENDANT SAMEEH HAMMOUDEH'S MOTION
FOR GRAND JURY TRANSCRIPTS

Defendant, SAMEEH HAMMOUDEH, by and through undersigned counsel, respectfully moves this Honorable Court, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii), to allow Defendant to inspect the grand jury transcripts in the above-styled cause and as good grounds therefore would show:

1. Mr. Hammoudeh was indicted in the above-styled criminal cause, pursuant to a multi-count Indictment that alleges, among other things, various RICO and other conspiracies.
2. The Indictment lists over two hundred alleged overt acts in furtherance of the alleged conspiracies.
3. The government has admitted that certain overt acts in which Mr. Fariz allegedly spoke to Mr. Awda are factually inaccurate as alleged in the Indictment. The Defendant has listened to the tape recordings, translating them to English and found many instances of inaccuracies.
4. Based upon the government's admission the Indictment for lack of probable cause, Mr. Hamoudeh has a particular need to inspect those portions of the grand jury transcript which

pertain to the charges against him.

6. Mr. Hammoudeh's particularized need for grand jury transcripts outweighs the need, if any, for continued grand jury secrecy.

7. Mr. Hammoueh's present motion is structured to request only those portions of grand jury transcript necessary for purposes of filing his motion to dismiss.

MEMORANDUM OF LAW

Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) permits disclosure of grand jury materials otherwise prohibited by Rule 6(e) where the defendant moves for disclosure and shows that a "ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Although Rule 6(e) does not set forth a standard by which courts may consider such motions the Supreme Court has held that "a strong showing of particularized need" is required before disclosure is permitted. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443-45 (1983); *see also In re Request for Access to Grand Jury Materials Grand Jury No. 81-1 Miami*, F.2d 1438, 1441-42 (11th Cir. 1985) (requiring "particularized need"); *United States v. Cole*, 755 F.2d 748, 758-59 (11th Cir. 1985) (same).

To show particularized need, "a party seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed..." *Douglas Oil Co. v. Northwest Petrol Stops Northwest*, 441 U.S. 211, 222-23 (1979); *see also United Kingdom v. United States*, 238 F.3d 1312, 1320-21 (11th Cir. 2001) (applying *Douglas Oil* requirements); *In re Request for Access to Grand Jury Materials*, 833 F.2d at 1441 (same). The *Douglas Oils* standard is a

“highly flexible one, adaptable to different circumstances,” *United States v. Doe*, 481 U.S. 102, 112 (1987), and is applied on a “case by case basis, focusing on the circumstances involved in the case under review.” *United States v. Noriega*, 917 F.2d 1543, 1547 n.6 (11th Cir. 1990); *see also In re Special Grand Jury 89-2*, 143 F.3d 565, 569 (10th Cir. 1998) (same).

As a preliminary matter, Mr. Hammoudeh satisfies the basic requirement of Rule 6(e)(3)(E)(ii) that the transcripts must be needed in order to file a motion to dismiss. *See, e.g., United States v. Bullock*, 448 F.2d 728, 729 (5th Cir. 1971) (granting motion to disclose grand jury transcripts in order to afford defendant opportunity to file motion to dismiss). Disclosure pursuant to rule 7(e) is the appropriate means through which a defendant must obtain evidence for a motion to dismiss based upon factual irregularities occurring before the grand jury. *See, e.g., United States v. Jacobson*, 691 F.2d 110, 116 (2nd Cir. 1982) (granting motion for grand jury transcripts in light of allegation that grand jury was misled as to the “quality of the evidence” upon which it indicted). As discussed in more detail below, Mr. Hammoudeh needs grand jury transcripts in this case in order to substantiate a motion to dismiss the Indictment for lack of probable cause. Mr. Hammoudeh’s belief that probable cause is lacking is based upon the government’s admission on the record in this case that it misidentified co-defendant Abd Al Aziz Awda as the person with whom Mr. Fariz was allegedly speaking in the telephone call which is the subject of Count 43 (Overt Act 253 of Count One) and that due to this misidentification, the references to Mr. Awda in Overt Acts 236, 240, and 247 of Count One are, as the government puts it “suspect.”

Mr. Hammoudeh’s particularized need satisfies the stringent requirements of *Douglas Oil* and its progeny for disclosure of grand jury transcripts in this case.

I. Need to Avoid Possible Prejudice in Another Judicial Proceeding

First, the grand jury transcripts requested in this present motion are “needed to avoid a possible injustice in another judicial proceeding.” *Douglas Oil*, 441 U.S. at 222-23. A federal grand jury may only indict a defendant upon being presented with probable cause that the defendant committed every necessary element of a federal criminal law. *United States v. Fern*, 155 F.3d 1318, 1324-25 (11th Cir. 1998) (citing Fifth Amendment due process right). In this case, the government has admitted¹ that it misidentified co-defendant Awda as a speaker i Overt Act 252 (Count 43), meaning the grand jury indicted Mr. Fariz based upon false information. The references to Mr. Awda (i.e., the evidence presented to the grand jury) in Overt Acts 236, 240, and 247 (Counts 35, 37, and 41) are, according to the government, “suspect.”² *See Trans. Of Status Proceedings before J. Pizzo*, April 8, 2003 (hereinafter “Status Trans.”) at 3-6. These admissions and concessions by the government seriously call into question the factual veracity of the *entire Indictment*.

The prejudice is especially compelling in this Indictment, which charges multiple conspiracy counts in which Mr. Hammoudeh is arguably legally responsible for the alleged conduct of all other co-conspirators. *See, e.g., United States v. Parrado*, 911 F.2d 1567, 1571 (11th Cir. 1990) (“It is axiomatic that a co-conspirator need not know all the details of the

¹ Because the government has admitted to the misidentification of co-defendant Awda, there is no question that Mr. Fariz presents substantiated allegations in support of his motion. *See, e.g., Cole*, 755 F.2d at 759 (unsubstantiated allegations do not satisfy particularized need standard).

² Furthering Mr. Hammoudeh’s need for grand jury transcripts is the fact that the government refuses to now identify to whom it now believes Mr. Fariz was speaking in Overt Acts 236, 240, 247, or 253. (*Status Trans.* At 10).

conspiracy and yet is responsible for the acts of his co-conspirators.”). It is therefore essential that Mr. Hammoudeh be permitted to inspect the grand jury transcripts to determine whether other counts and Overt Acts attributed to him, either directly or through conspiracy theories, are factually accurate. Otherwise, incorrectly analyzed evidence presented to the grand jury with respect to Overt Acts that do not at first glance involve Mr. Hammoudeh may nevertheless later wrongly implicate him in a criminal conspiracy.³

II. Need for Disclosure Greater than Need for Continued Secrecy

Second, Mr. Hammoudeh’s need for disclosure of grand jury materials is “greater than the need for continued secrecy.” *Douglas Oil*, 441 U.S. at 222-23. The Supreme Court has recognized five reasons for grand jury secrecy:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Douglas Oil, 441 U.S. at 219 n.10 (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3rd Cir.

³ For Example, Overt Act 72 of the Indictment alleges that Mr. Al-Arian “had a telephone conversation with [Mr. Awda], who was overseas, in which they discussed the passport problems of PIJ members and the in-fighting among various factions within the PIJ.” If the government is incorrect with respect to the identity of either of the individuals speaking - as they are admittedly incorrect with respect to the identity of Mr. Awda in at least one other telephone call - that overt act might not count as conduct in furtherance of the conspiracy. Because Mr. Hammoudeh, as an alleged co-conspirator, would arguably have been held legally accountable for the allegations in Overt Act 72, he has a vested interest in determining whether the grand jury was presented with factually inaccurate information concerning that paragraph, and, in turn, has a vested interest in the accuracy of the entire indictment, as it pertains to him.

1954)). The interest in grand jury secrecy are reduced, though not eliminated, where the grand jury has needed its activities. *Id.* At 222; *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) (“[A]fter the grand jury’s functions are ended, disclosure is wholly proper where the ends of justice require it.”).

The grand jury that indicted Mr. Hammoudeh may no longer be empaneled, in which case the first three reasons for grand jury secrecy “are no longer of major concern.” *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1274 (11th Cir.) (Applying above factors and determining that movant’s need outweighed need for further grand jury secrecy), *cert denied sub nom., Hastings v. Investigating Committee of the Investigating Committee of the Judicial Council of the Eleventh Circuit*, 469 U.S. 884, and *reh’g denied*, 469 U.S. 1001 (1984). Even if the grand jury is still empaneled, the Court may alleviate any risks associated with the first three factors by inspecting *in camera* the grand jury transcripts, and redacting them as needed. Furthermore, with respect to the latter two justifications for further grand jury secrecy, any such concerns may be alleviated by the Court’s placing of restrictions upon the dissemination of the grand jury transcripts (See existing Protective Order on Intercepts).

Indeed, it is important to note that, with respect to the need (if any) for continued grand jury secrecy in this case, the Court may order the disclosure requested subject to a number of restrictions Fed. R. Crim. P. 6(e)(3)(3) (“The Court may authorize disclosure - at a time, in a manner, and subject to any other conditions that it directs ...”).

Finally, Mr. Hammoudeh’s present motion is “structured to cover only material so needed” to support a motion to dismiss. *Douglas Oil*, 441 U.S. at 222-23. His request is

narrowly tailored to include only those counts and paragraphs of the Indictment in which he is allegedly implicated in criminal activity, either directly or through an alleged conspiracy with co-defendants and others unnamed.

WHEREFORE, Defendant SAMEEH HAMMOUDEH, respectfully moves this Honorable Court to grant his motion to inspect the grand jury transcripts in the above-styled criminal case.

Respectfully submitted,

LAW OFFICES OF STEPHEN N. BERNSTEIN

A handwritten signature in black ink, appearing to be 'S. Bernstein', written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished to

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by regular U.S. mail delivery on this 15 day of September 2003.


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